

ACCOUNTABILITY OF CHARITABLE TRUSTS

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THE ISSUE OF SUPERVISION

Over a century ago Stephen Girard's bequest to establish a boarding school for "poor, male, white orphan children" was upheld by the Supreme Court.¹ In the intervening years the restrictions of Girard's trust have been challenged several times.² Now, once again his will has been contested.³ The recent Pennsylvania contest grew out of the segregation issue when the City of Philadelphia and the Commonwealth joined two negro applicants for admission to Girard College in petitioning for a citation on the Board of Directors of City Trusts to show why the applicants should not be admitted. The Pennsylvania court approved the refusal, the majority opinion maintaining that Girard had the right to limit his bequest⁴ and that the City of Philadelphia in holding the trust was acting only in a fiduciary capacity limited to the same rights as any individual or trust company acting as trustee.⁵ Subsequently the United States Supreme Court has reversed the Pennsylvania decision, upholding the dissenting opinion that the Girard trust is now within the orbit of the Fourteenth Amendment and that no testator had the right to ask government to do something prohibited by the Constitution.⁶

Although the issue of court protection comes in a new guise today, the Girard case points up the problems inherent in charitable giving. The complications resulting from the divorcing of the ownership of property from its use have lain back of the slow acceptance of trust enforcement.⁷ When the law upheld the rights of the donor to create a trust and to impose whatever duties he chose to exact and the trustee would accept, it made the instrument itself govern alike the duties of the trustee and the rights of the beneficiary.⁸ Its terms must therefore clearly designate the beneficiary and specify the duration of the life of the trust. Because the law made the trustee answerable to the terms of the trust, loyal to the interests of the beneficiary, prudent in his acts and decisions, he was permitted to seek instruction from the court and be protected from personal liability where he carried out its instructions.⁹

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¹ *Vidal v. Girard's Executors*, 43 U. S. (2 How.) 127 (1844).

² Changing emphasis in the field of child care led to efforts to break the will in the '30's. See Bradway, "New Uses of Wealth as Endowment," 151 *Annals* 185 (1930).

³ *In re Girard's Estate*, 127 A. 2d 287 (Pa. 1956).

⁴ *Id.* at 288.

⁵ *Id.* at 293.

⁶ 25 U.S. L. WEEK 3316 (U.S. Apr. 29, 1957), *sub nom.* *Pennsylvania v. Board of Directors of City Trusts*.

⁷ Holmes, *Early English Equity*, 1 L. Q. Rev. 162 (1885).

⁸ 3 Bogert, *Trusts and Trustees*, §551.

⁹ 3 Scott, *Trusts* §394 (1939).

More importantly, however, for enforcement purposes, the beneficiary could lay claim to the benefits of the trust, and his material self-interest could be counted upon to provide the motive and energy to make the private trust readily enforceable.¹⁰

The privileges granted and the responsibilities exacted in the case of the charitable trust differ from those in the case of the private trust. Since the donor wishes to give to social uses, his gift must have approval as one beneficial to the community. The catalogue of approved objects has been an ever expanding one.¹¹ What benefits the community may seem capable of curious construction when the House of Lords upholds oyster dredging as contributing to community well-being or a gift can be reported from Olathe, Kansas, providing a Christmas dinner for horses, but the courts have been tolerant of minority opinion and eccentric views.

Most of these special purpose funds represent an extension of earlier objects that gained approval centuries ago, familiar gifts for the relief of poverty, for the furtherance of religion and education. Conflicting views as to what constitutes community benefit have been supported. Trusts to promote peace by disarmament are equally charitable with trusts to prevent war by preparedness. Similarly, the courts do not rule against views on the grounds that the majority of the public would disagree.¹² The fact that a theory has few adherents will not invalidate its acceptance for purposes of charitable giving. These gifts are valid precisely because they are gifts to minority opinion and thought worthy of encouragement in a free society.

The fact that charitable gifts serve social ends has another important consequence. The gift must reach beyond the donor or the specific individuals who may be helped by it to society as a whole.

While the courts often talk of individuals who are to get charitable benefits as 'beneficiaries,' strictly speaking the state is the only party having a legal interest in enforcement, and the human beings who are favorably affected by the execution of the trust are merely the media through whom the social advantages flow to the public. If a trust has as its object the care of the poor, those persons who are chosen to secure the necessities of life under it are not in reality beneficiaries of the trust but only the instrumentalities through which the state receives the social advantage of seeing that its citizens do not suffer want.¹³

¹⁰ 2 Scott, *Trusts*, §200 (1956).

¹¹ Zollman, *American Law of Charities*, 126 (1924). By 1833 the 21 admissible objects enumerated in the Elizabethan Statute had been extended to 46 purposes. (43 Eliz. c. 4) (1601).

¹² 2 *Restatement, Trusts*, §374 (1935).

¹³ Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 Mich. L. Rev. 633 (1954). For extended discussion see 2A Bogert, *Trusts and Trustees*, §361 (1953).

Because the law has attempted to measure the intangibles of social gains by testing the disinterestedness of a gift in terms of a benefit to a shifting or anonymous group, gifts to these "indefinite beneficiaries" escape some of the limits applying to private trusts—they are on-going or made "in perpetuity",¹⁴ and usually not subject to the bans on accumulations which affect ordinary property holdings.¹⁵ Recognition of the possibility of out-moded trusts likely to result from changing circumstances has also modified the ways in which the trust instrument governs the duties of the trustees. The court may exercise cy pres powers¹⁶ to reapply the gift to current objects paralleling the original bequest.

One of the most substantial privileges accorded the charitable gift is exemption from taxation.¹⁷ Such freedom from the ordinary rules of giving amounts to an actual subsidy. The value of the gift is augmented by indirect giving on the part of the state itself.

The privileges extended to charity are based on the assumption that philanthropy contributes to the state. The rights to be protected are social rights and government protects them. Supervision of the charitable trust is the responsibility of a state official, usually the attorney general.¹⁸

The social consequences of charitable giving have made the question of accountability a basic one. Tests of the charitable quality of a gift in terms of loyalty to the common good are difficult to apply. Back of the accumulated law is the basic assumption that no one must profit from it. Both the donor's right to give and the beneficiaries' right to receive are seen as incidental to intangibles of community well-being resulting from the gift. Although the courts have been liberal in interpreting what is a valid charitable purpose, and have evaded the quicksand of trying to make motives in themselves decisive,¹⁹ they have been strict in differentiating between profit making and charitable activities. The test is, of course, most evident in tax exemption.

The cliché stolen from Brutus' speech in *Julius Caesar* is especially appropriate to gifts in perpetuity which though good in one age may become the evils of another. Adaption has been made through constant expanding of the catalogue of approved purposes and the development of the cy pres doctrine for correcting the donor's mistakes in not out-guessing the future.²⁰ But whether focused on the donor at the point

¹⁴ 3 Scott, *Trusts*, §365 (1939). Note exceptions.

¹⁵ 3 *id.* §401.9 (1939).

¹⁶ 2A Bogert, *Trusts and Trustees*, §431 (1953).

¹⁷ 2A *id.* §361 (1953).

¹⁸ 2A *id.* §411 (1953); 4 Scott, *Trusts*, §391 (1956).

¹⁹ 4 Scott, *Trusts*, §348 (1956). As Scott points out regarding the famous contest between Binney and Webster the court was not even concerned with the question of whether Girard's motive was to help his neighbors or spite his heirs but the use to which his property was to be put.

²⁰ See Hobhouse, *The Dead Hand*, 63 (1880); Beveridge, *Voluntary Action*, 360 (1948).

The development of a special device known as the "community trust" has

of gift making, the trustee as holder of the gift, or the beneficiary through whom social gains are realized, the transfer of private gifts to public uses comes under governmental supervision.

GOVERNMENTAL HEARINGS AS AN INDEX OF TRENDS

Governmental hearings have been a sounding board for public concern with the problem of regulation. Although the arguments may be distorted somewhat, they are a fair index to the issues which have captured attention. In England the Brougham Commission climaxed legislative reforms dating back to Tudor times.²¹ This marathon investigation which ran for nineteen years and ended in a thirty-seven volume report, resulted in the Charitable Trust Act in 1853.²² The legislation sanctioned the setting up of a separate administrative board, provided for reporting measures expected to create a national registry of trusts, and semi-judicial powers to modify court machinery in dealing with out-moded trusts. Recently, the Nathan Committee²³ reviewed the work of the Commission and urged changes in the substantive law to allow for a more flexible definition of "charity",²⁴ relaxation of the *cy pres* doctrine,²⁵ and administrative changes affecting board reorganization.²⁶ Compulsory reporting was also urged.²⁷ The Committee summed up the problem of the multiplicity of small trusts by pointing out that there were over 110,000 trusts known to the Commissioners and the Ministry of Education of which a fourth were more than a hundred years old and a third not valued at more than £25. Some 80,000 were still tied to special purpose funds for the sick and needy, and most of the new ones have followed this traditional pattern.²⁸

American arguments about control have been conditioned by the fact that foundations are a comparatively recent development and have characteristically taken the corporate form.²⁹ It is the possibility of abuse

provided a kind of auxiliary method for balancing the contradictory demands of a trust instrument and a purpose no longer regarded as socially useful. In selecting a trustee the donor may set up an individual fund or series of funds in a given bank or trust company. Furthermore, he may allow discretionary authority to merge his gifts with those of others in a composite or general fund. The community trust attempts to solve three problems often encountered in the making of a charitable gift: It anticipates future contingencies. It provides responsible financial management. It encourages informed community participation. The community trust may be regarded as a device for anticipating some of the problems with which regulation is presumed to deal.

²¹ Kenny, *Endowed Charities*, 134 (1880).

²² 16 and 17 Vic., c. 137 (1853).

²³ Report of the Committee on the Law and Practice Relating to Charitable Trusts, Nathan Committee Report. Cmd. 8710.

²⁴ *Id.* at 36.

²⁵ *Id.* at 91.

²⁶ *Id.* at 100.

²⁷ *Id.* at 44.

²⁸ *Id.* at 27.

²⁹ Andrews, *Philanthropic Foundations*, 45 (1956).

through the latitude of broadly phrased charter purposes, the hierarchical nature of donor dominated boards, and the directive force of conditional grants which have preoccupied American investigative groups. Different aspects of these problems are evident in the successive hearings. Early in the century the Senate Commission on Industrial Relations³⁰ investigated the foundations as a part of its inquiry into the industrial activities of their founders. The carrying over of business methods and philosophy to philanthropic giving was interpreted as a further extension of the control of the big corporations and a dangerous "benevolent absolutism."³¹ National regulation was advocated through the substitution of public social services for private charities and federal chartering limiting foundations to a single purpose, putting a ceiling on expenditures, and requiring public reporting.³²

The second series of hearings came during the period surrounding World War II. Although again focused on the possible perversion of charity by the donor, the investigations into foundation activities in the Forties³³ were notable for their attack on "masqueraders."³⁴ Again reporting and registry measures were urged, but these were emphasized as appropriate tax measures³⁵ or the extension of existing state machinery to help protect the bona fide charitable organization.³⁶

The Cox³⁷ and Reece³⁸ hearings reflected the peculiar fears growing out of the cold war. Concern with the dangers of Communist infiltration in American life lay back of these investigations of the role of the foundation in underwriting education and research and the extent to which their funds had been perverted to "un-American and subversive activities." But again the basic question of corporate form came up for discussion. The presumption that the foundations had been "taken over" by Communists had its origin in the recognition of the nature of relationships between board and staff and the separation of managerial functions from policy making. In another sense the hearings were directed at the beneficiaries for the research reports were challenged as propaganda for leftist thinking.³⁹

³⁰ Industrial Relations S. Doc. No. 415, 64th Cong., 1st Sess. (1916).

³¹ *Id.* at Vol. VIII, 7664, 7919.

³² *Id.* at Vol. I, 85.

³³ Hearings before Subcommittee on Interstate and Foreign Commerce, Closing of Nashua, N. H., Mills, of the Senate, 80th Cong., 2d Sess. (1948).

³⁴ See Chambers, *Charters of Philanthropies*, 6 (1948).

³⁵ Hearings before Committee on Ways and Means of the House, Pt. V., 77th Cong., 2d Sess. vol. 1, rev. 89 (1942). 5 *Id.* Revenue Code Revision at 3411 (1948).

³⁶ Report of Special Committee to Study the Laws of This State with Respect to and Governing Charitable Trusts, So-Called, 6 (1950).

³⁷ Hearings Before Select (Cox) Committee to Investigate Tax Exempt Foundations and Comparable Organizations (House), 82nd Cong., 2d Sess. (1953).

³⁸ Hearings Before the Special (Reece) Committee, House Report No. 2681, 83d Cong., 2d Sess. (1954).

³⁹ Cox Hearings, *infra* note 52, at 7. Reece Hearings, *supra*, note 38, at 472.

As Keele has wisely remarked the significance of governmental attitudes toward foundations is best understood in terms of the freedom accorded them.

There could have been imposed upon foundations rigid restrictions as to the method of their creation and their legal form; the amount of their permissible assets; their purposes; the right of perpetuity; the number and type of trustees, the length of time they could serve, the method of their election and the amount of their remuneration. There could have been imposed supervision by governmental bodies and participation in management by governmental officials, which could, and almost to a certainty, would have meant actual control by government. And lastly, there could have been heavy and even ruinous taxation. The nonexistence of such measures is as significant in determining the attitude of government as the existence of the applicable laws, and, indeed, it is only when we view both the positive and the negative aspects of applicable law that we get the matter in proper perspective.⁴⁰

In this regard the findings of the Rhode Island⁴¹ investigative group are important. In contrast to the four national hearings which have been focused on the overall role of the foundation in American life, these hearings were subordinated to the specific task of reporting on the existing law governing trusts. The two recent hearings in California⁴² and New York⁴³ have also concerned themselves with state machinery.

STATE MACHINERY FOR TRUST SUPERVISION

There have been significant changes in state legislation within the past decade. To appreciate the full force of this movement the prevailing machinery for trust enforcement needs to be considered. Although the testamentary trust is subject to the statutes applying to wills, and registry of such gifts is incidental to settling an estate, identifying information is scattered about through numerous courts having jurisdiction. An inter vivos trust may be created by conveyance, deed, or declaration of trust. Its existence may be known only to the parties concerned, the donor, the lawyer drawing up such an agreement, and possibly the tax authorities. Under the circumstances challenge to such a gift is unlikely.

Not only may a trust come about without being identified, but when its existence is known, there is limited provision for supervision over trustees. A majority of jurisdictions require reports from testa-

⁴⁰ Keele, "Government's Attitude Towards Foundations," 33 Mich. State Bar J., 15 (Oct., 1954).

⁴¹ Report of Special Committee, *supra*, note 36, at 13-15.

⁴² Cal. Senate Interim Judiciary Committee, Second Progress Report, Senator Bush, Chairman (1953).

⁴³ Report of Joint Legislative Committee on Charitable and Philanthropic Agencies and Organizations. Leg. Doc. No. 26 (1954).

mentary trustees of trusts, others have statutes applying to all trustees, but except for those states which have recently adopted trust registries, few require systematic reporting by charitable trustees.

Indiana,⁴⁴ Wisconsin,⁴⁵ and North Carolina⁴⁶ have comprehensive statutes exacting reporting. Yet Indiana officials rely rather on the informal notification from trustees about proceedings or duplicates sent by them of court reports.⁴⁷ In North Carolina the clerk of the superior court is specifically charged with the responsibility for notifying the attorney general of the failure of a trustee to report. Yet inquiry⁴⁸ suggests no action has been brought as a result of the clerk's notification and question as to whether more than a few reports had been filed. In Wisconsin action was based on court reports in only two cases.⁴⁹ The comments from this state are particularly revealing because of the statute widening the definition of "interested party."

Enforcement of Public Trust: 1) An action may be brought by the attorney general in the name of the state, upon his own information, or upon the complaint of any interested party for the enforcement of a public charitable trust. 2) Such action may be brought in the name of the state by any 10 or more interested parties on their own complaint, when the attorney general refuses to act. 3) The term "interested party" herein shall comprise a donor to the trust or a member or prospective member of the class for the benefit of which the trust was established.⁵⁰

This legislation is reminiscent of the English legislation which attempts to encourage bringing information regarding trust abuses to the attention of authorities. Yet reliance on such devices seems to have been unrealistic. Not only is the beneficiary likely to be ignorant of his presumed benefits, but the involvements of such participation are formidable.⁵¹

Although the conscientious trustee may follow through on his presumed duty, the evidence suggests that this is exceptional. A review of Iowa court records in a populous county seems typical, not only in the discovery that only one trustee had filed reports within the period extending over the last decade but in the clerk's attitude that this particular trustee, a well known legal figure in the state, was being scrupulously in character. Even the scrupulous trustee might be expected to overlook a duty not made explicit. The frustrations of investigative groups trying to get the simplest facts of identification about charitable organizations

⁴⁴ Ind. Ann. Stat. §§31-712, 31-713 (Burns, 1953 Cum. Supp.).

⁴⁵ Wis. Stat. §317-06 (1953).

⁴⁶ N.C. Gen. Stat. 36-19 (1950).

⁴⁷ Taylor, *Public Accountability of Foundations and Charitable Trusts*, 37 (1953).

⁴⁸ See 21 Univ. Chi. L. Rev. 123 (1953).

⁴⁹ *Ibid.*

⁵⁰ Wis. Stat. §231.34 (1953).

⁵¹ 2A Bogert, *Trusts and Trustees*, §§411-12 (1953).

are a matter of record. The Cox Committee could not arrive at any accurate figures about the numbers of foundations or their assets, and the resulting recommended bill urged compulsory reporting.⁵² The recent New York Joint Legislative Committee declared in its report:

The sparsity of the data on the activities of organized charity tends to make this field a playground for the unscrupulous. The Committee uncovered several instances where persons with known criminal and racketeering records moved into the business because there was no supervision.⁵³

Although directed at fund raising groups the findings of the Joint Committee suggest even more strongly the lack of supervision over trustees who hold funds. The boiler room operator may succeed in mulcting the public, but his methods have a way of uncovering him. The unauthorized use of the names of presumed sponsors and the annoyance of those solicited helped to stimulate the probe. When Bing Crosby's and President Eisenhower's names are used without permission, the organization comes to light. Perhaps the most revealing fact about the inquiry was pointed up in the Committee's confession that it was easier to prepare the questionnaire than to locate all agencies and organizations to which they should be sent. Of the 900 names assembled, the Committee admitted that it had no way of knowing what percentage of organizations was actually covered.⁵⁴

The extension of court powers through "visitation" has often been regarded as providing for supervision.⁵⁵ Traditionally the right was presumed to be lodged in the donor as a condition of giving. But this right of the donor which passed from him to his heirs or might be assigned to a board of visitors is infrequently used in America. Such active supervision is uncongenial to a court system which keeps administrative and judicial functions separated. Although analogous powers have been granted boards over charitable institutions, these are characteristically legislative grants to public officials charged with responsibility over service programs. As Bogert has pointed out, the cases on visitation are almost all concerned with absolute gifts to corporations or gifts to corporations in trust and though there is some authority for such powers with regard to private trustees for charity, the exact status of the doctrine is not perfectly clear in modern American law.⁵⁶

Perhaps the most important and subtle powers of the court in protecting charitable gifts is through the application of cy pres.⁵⁷ When the donor's particular purpose seems impractical or impossible to carry out, the court may redirect the gift and save it from being lost. Although

⁵² Final Report Select (Cox) Committee, House 2514, 14, Appendix A.

⁵³ Leg. Report, *supra*, note 43, at 16.

⁵⁴ *Id.* at 9.

⁵⁵ *Philips v. Bury*, 2 Durnford and East 346, 352 (1788).

⁵⁶ Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 Mich. L. Rev. 633 (1954).

⁵⁷ 2A Bogert, *Trusts and Trustees*, §431 (1953).

American philanthropy has not suffered from the problem of outmoded trusts in the same measure as has been the case in England, the sheer passage of time may result in defeating a gift. There continues to be some resistance to the application of the doctrine, but judicial and legislative acceptance has paralleled the growth of private philanthropy.⁵⁸ In the more complex area of "general charitable intent" Pennsylvania has attempted to solve the problem by a statute expressly abolishing the distinction between "general" and "particular" intent.⁵⁹ It should be remembered, however, that *cy pres* is only applied when other remedies fail.⁶⁰ Furthermore, the steps by which the *cy pres* application comes before the court are in themselves controlling and in this regard the role of the attorney general is indispensable.

Investigations incidental to the establishment of trust registries in Rhode Island⁶¹ and New Hampshire⁶² and discussion and reports⁶³ preceeding the recent changes that have resulted in comparable legislation in Ohio, South Carolina, and California reveal the difficulties under which the attorney general labors in trying to carry out his duties. Action taken at the national association in urging remedial legislation and the adoption by the Commissioners on Uniform State Laws and the American Bar Association of a uniform act⁶⁴ indicate a new trend.

The opinions of the officials themselves are of special interest because of their direct involvement in administration. In a follow up of an earlier questionnaire⁶⁵ the writer learned that legislative proposals have been under consideration in ten states.⁶⁶ In 1956 the uniform act was proposed in Arizona but not voted out of committee. Two bills were introduced in Indiana but failed of passage as did the ones in Wyoming, Washington, Texas, and Pennsylvania. Efforts to introduce the uniform act in Michigan two years ago met with such opposition that no new attempts are likely soon. New Jersey has been reviewing the matter, especially in view of the experience of the attorney general in discovering trusts years after their creation. Oregon has legislation under consideration, but matters are only at the discussion stage as is the situation in Kentucky and Nebraska. An Illinois commission is now working on the matter. In those states where no legislative action is

⁵⁸ Fisch, *The Cy Pres Doctrine in the United States*, 115 (1950).

⁵⁹ Pa. Stat. Ann. tit. 20, §301.10 (1947).

⁶⁰ 2 *Restatement, Trusts*, §399 (1935).

⁶¹ Report of R. I. Special Committee, *supra*, note 36.

⁶² D'Amours "The Control of Charitable Trusts by the Attorney General" Proceedings National Association of Attorneys General 98 (1946). Round Table: Supervision of Charitable Trusts, Proceedings 156 (1953).

⁶³ Taylor, *supra*, note 47, at 143.

⁶⁴ Uniform Supervision of Trustees for Charitable Purposes Act.

⁶⁵ Taylor, *supra*, note 47, at 143.

⁶⁶ Letters were addressed to all states and replies received from 47 jurisdictions. The officials were asked specifically about whether the Uniform Act or comparable legislation was under consideration. File available through Council of State Government.

under consideration comments reflect divergent opinion. One attorney general expressed the belief that since trust enforcement is a duty laid upon the attorney general, no legislative changes are necessary but proper administrative adjustments appropriate to better office management.⁶⁷ Another official gave as his personal opinion that there must be thousands of unidentified charitable trusts but did not wish to commit himself on proposed legislation.

The experience in Texas has been fully reported by Attorney General Shepherd in the proceedings of the National Association of Attorneys General⁶⁸ and hints at the problem of opposition from special interest groups. It is not clear what developments may take place there. Failure to get legislation in Pennsylvania has led the attorney general to try to work out special liaison measures with the local courts. In a letter⁶⁹ sent to each court he has requested that the judge have the clerk prepare a list of existing charitable trusts, description of the purposes for which it was established, and accounting details ordered by the court.

The Pennsylvania efforts are of particular pertinence because of the modification of the common law duties of the attorney general under the Estates Act.⁷⁰ The progressive intent of this statute is obviously defeated where the attorney general had no knowledge of the need for his assistance.

STATE SUPERVISION OF CHARITABLE CORPORATIONS

Although the basic machinery for trust supervision⁷¹ lies with the courts and the attorney general is the official usually charged with enforcement duties, other state officials may have a role in regulation. When the foundation is organized as a non-profit corporation, the resulting powers are a legislative grant, and the question of charter issuance, reporting, and revocation are crucial.

These statutes have special relevance in view of the fact that the larger foundations take this form, that the entry into the philanthropic field of the business corporation has intensified the trend, and that approximately three fourths of existing foundations are incorporated.⁷²

Although such important early foundations as the Smithsonian, Rockefeller, Guggenheim, and Russell Sage were created by special charter, foundations are typically chartered under the provisions of the general corporation statutes.⁷³ These provisions vary from jurisdiction

⁶⁷ These unofficial opinions are not included in the letters on file.

⁶⁸ Round Table, Proceedings, 53.

⁶⁹ Letter from Deputy Attorney General Forer included in letter to writer dated June 20, 1956.

⁷⁰ Pa. Stat. Ann. tit. 20, §301.10 (1954)

⁷¹ As Scott points out, ordinarily the rules which are applicable to a charitable trust are applicable to a charitable corporation although some are not. 3 Scott, *Trusts*, 348 (1939).

⁷² Andrews, *Philanthropic Foundations*, 45 (1956).

⁷³ Taylor, *supra*, note 47, at 50 (1953).

to jurisdiction. The two extremes are probably represented by Delaware⁷⁴ and New York.⁷⁵ Delaware, despite its extensive business corporation laws, has no separate statutes applying to non-profit organizations while New York has a series of some twelve different statutory provisions covering various classes of corporations. Once classified, an organization then becomes subject to the statutes applying to the general group to which it belongs. The application of relevant law is more evident in those states which specify listings of types of organizations such as California, Illinois, Ohio, Pennsylvania, Wisconsin, and New York. Under any circumstance the full force of the non-profit law can only be evaluated when legislation affecting public welfare laws, charitable donations and subscriptions, tax exemption, and similar measures are reviewed.

The issuance of a charter is an important first step in the transfer of private wealth to public uses. Yet in most states the declaration of intention, the filing of forms, and the certification is almost a continuous process. Ohio⁷⁶ and Pennsylvania⁷⁷ statutes add the additional requirement that in the case of a corporation created in accordance with the directives of a trust instrument the instrument be filed with the charter application. Some legislation provides for public notice, such as the inclusion of the names of the incorporators in an official list or the lapse of a stipulated number of days before the application can be approved. But these provisions are part of the routine rather than a check on chartering.

Additional safeguards exist in a few states. The approval of a Supreme Court Justice is required in New York,⁷⁸ and the court may review the application in Pennsylvania.⁷⁹ However, a search of citations suggests that charters are rarely contested. The name of the organization may rouse suspicion, the purposes may be so vague as to be questionable, the possibility of tax evasion may stimulate review.

Recent comment by two Pennsylvania judges is suggestive. One justice declared in reversing Master's decision based on suspicion directed at the incorporators: "While the application for a charter may not be subject to exactly the same rules as some other judicial proceedings, it is subject to the fundamental one that persons before the court shall not be condemned by a judge's findings without being given an opportunity to be heard."⁸⁰ The other justice passing on a charter application about which questions of tax evasion had arisen, pointed out that court review

⁷⁴ Oleck, *Non-Profit Corporations and Associations*, 8 (1955).

⁷⁵ *Id.* at 10.

⁷⁶ Ohio Rev. Code §§1719.01-06 (Supp. 1956).

⁷⁷ Pa. Stat. Ann. tit. 15, §§2851-213 (1954).

⁷⁸ N. Y. Membership Corp. Law, §10-11.

⁷⁹ Pa. Stat. Ann. tit. 15, §§2851-207 (1954).

⁸⁰ *Incorp. of Philadelphia Labor's Non-Partisan League*, 328 Pa. 465, 196 Atl. 22 (1938).

only occurred when there was evident violation of public policy. Warning of possible alteration by by-laws, he asserted that charter issuance must be carefully weighed because the inherent right of such corporations to amend the original charter was "pregnant with potential evils."⁸¹

Although most not-for-profit laws have some reporting provisions, these important safeguards are dependent on basic identification. Collection of such reports would necessarily depend on the existence of some kind of file which in turn would depend on the explicitness of obligation laid on the official and the administrative provisions for carrying it out. The Illinois statute, for example, gives important interrogatory powers to the secretary of state.⁸² Failure to respond to his questions is classified as a misdemeanor and subject to \$100 fine. Failure to report is ground for complaint proceedings to dissolve the corporation. Yet this enforcement machinery intended by the drafters to provide adequate regulation is dependent on information not collected in any central place. The recent legislative changes in Massachusetts and California have come about because officials found themselves charged with inspection duties without the administrative provision for carrying them out.⁸³ In view of the comparative stringency of provisions in these states, it would seem that in most jurisdictions protection of the public interest is far from assured.

Corporate dissolution is in most states a routine affair. There has been some recognition of problems in the case of charitable corporations holding trusts. New York,⁸⁴ Michigan,⁸⁵ Illinois,⁸⁶ and California,⁸⁷ for example, have statutes providing for such application. Yet the general process is usually comparable to that of charter issuance—a matter of board resolution and filing with the designated state official of the appropriate forms. Although interim supervision during dissolution proceedings may be provided by the court, the stipulation that such approval be a condition of voluntary dissolution is the exception.⁸⁸ The action of the New York legislature in 1951 is a comment on enforcement. The legislators added a new chapter to the Membership Law requiring all corporations organized prior to January 1, 1948, to file a certificate of existence, those failing to file being subject to dissolution by proclamation. It would seem that even in a state in which the court, the secretary of state, and a special departmental board was supposed to have some check on charitable corporations there was some doubt as to the facts of corporate existence.⁸⁹

⁸¹ In re Nat. Foundation of Dramatic Arts, 62 D. and C. 343, 346 (Pa. 1947).

⁸² Ill. Ann. Stat. c. 32, §163A49-64-97 and 98 (1954).

⁸³ See footnote 47 *supra* for California; footnote 108, *infra*, for Massachusetts.

⁸⁴ Membership Corp. Law, §55.

⁸⁵ Mich. Stat. Ann., tit. 15, §21.168.

⁸⁶ Smith-Hurd Ill. Stat. Ann., c. 32, §163A54.

⁸⁷ Deering's Calif. Corp. Ann., §9801.

⁸⁸ Revised Laws N. H. 1942, c. 272, §8-10.

⁸⁹ See Leg. Committee Report, *supra*, note 54.

In a number of states investigative functions have been assigned to welfare boards. The New York Membership Corporations Law⁹⁰ divides responsibility among those having supervisory powers over various service programs, other states lodge them in the general board of welfare or one of its divisions. Practically every jurisdiction required investigation of charter applications for proposed organizations in the child welfare field. Massachusetts and South Carolina have had the most explicit legislation of this kind, and developments in these two states are indicative of trends. Massachusetts welfare offices sought such powers as early as 1867,⁹¹ gained them in 1901,⁹² further extended them in 1910.⁹³ Early reports give detailed information about the investigations carried on by the department. By 1927 the matter was becoming routine and within the next ten years the practice had become that of listing approved organizations and reporting the number of applications refused.⁹⁴ A similar course is evident in the South Carolina reports. In this state investigative functions were given to the board in 1920.⁹⁵ The act was aimed at fund solicitation but required board endorsement of all charitable corporations except the religious and eleemosynary institutions specifically exempted. The South Carolina like the Massachusetts reports show the same subordination of these functions to the demands of service.⁹⁶

Under the most recent legislation the protection of charitable endowments is now the duty of the attorney general in these two states. Such recent changes as those in New York incidental to the creation of a registry in the Department of Social Welfare grew out of charity racketeering which threatened support for legitimate agencies. Legislative assignment of certification to the welfare department is in an area in which agencies have a practical stake and comes closer to their usual licensing functions.

TAX EXEMPTIONS AND SUPERVISION

Both federal and state exemptions are important inducements to philanthropic giving. There are almost as many variations in practice as jurisdictions and the comparatively greater inducement offered through federal exemption means that the state legislation is much less decisive. However, local tax boards have had a role in charitable supervision in passing on the claims of trusts and foundations. Suspicion of abuse may lead to such action as reported on the part of the Wisconsin Tax Commissioner in exacting reports from all foundations.⁹⁷ However excep-

⁹⁰ N. Y. Membership Corp. Laws, §11.

⁹¹ Mass. Public Document No. 17, p. lxxiv, (1867).

⁹² Mass. Chapter 405 Acts of 1901.

⁹³ Mass. Gen. Laws, Chapter 180, §12.

⁹⁴ Note reports of State Department for years 1910-26 particularly. See Kelso, *The Science of Public Welfare*, 83 (1928).

⁹⁵ S. C. Act No. 448, Feb. 26, 1920.

⁹⁶ Taylor, *supra*, note 47, at 69.

⁹⁷ Milwaukee Journal Nov. 15, 1945, and Feb. 14, 1946.

tional the zeal of this official may be, it suggests the importance of tax boards as a supervisory mechanism—and the peripheral question of the extent to which tax officials may be exercising regulatory powers through default by other supervisory groups.

At a time when the inflationary spiral winds upward, when individual income taxes reach those at the subsistence level, and corporate surtaxes and excess-profit taxes limit earnings, tax favors are enviously if not cynically regarded. Even when an organization is devoted to a bona fide charitable purpose, there are important socio-economic problems involved in the tax favors granted charities. Such spectacular pyramiding as that of the Little Trusts are probably less likely since the 1950 amendments, but there is little question that the Ford Foundation, though active in carrying out an educational and research program, enabled the Ford family to continue a suzerainty over a great industry threatened by estate and inheritance taxes.⁹⁸

The ambivalence regarding charitable exemption is reflected in the Cox Committee report which though advocating more stringent reporting provisions also recommended that the Ways and Means Committee consider modifying the tax structure to encourage contributions.⁹⁹ Foundations are exempt under the provisions of Sec. 501(c)(3) of the 1954 Code. This section repeats the older Sec. 101(6) with the addition of a new blessing extended to organizations "testing for public safety." The classification also carries with it the familiar tests regarding the conditions of exemption with a new specification regarding the influencing of legislation that the exempt organization does not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office.

The inducements offered to individual and corporate tax payers are quite considerable. The foundation is twice blessed; not only is its investment income exempt but contributions to it are not taxed. Individuals may deduct as much as 30 per cent of their adjusted gross income though the recently added ten per cent must go to regularly operated religious, educational, or hospital organizations. Corporations are permitted exemption of five per cent. Furthermore, there is neither gift tax nor estate tax on property given or left to charity.

The changes in the substantive law made in 1950 aimed at certain loopholes, especially those regarding "prohibited transactions" and "unreasonable accumulations." There are those who contend that far from effecting the reforms intended, these provisions set a new standard for

⁹⁸ For general discussion of tax regulation see, Eaton "Charitable Foundations and Related Matters Under the 1950 Revenue Act" 37 Va. L. Rev. 253 (1951). "The Modern Philanthropic Foundation: A Critique and Proposal," 59 Yale L. J. 477 (1950).

⁹⁹ Select (Cox) Committee Final Report, 13.

"reasonable management" and substitute the tax collector for the attorney general in trust enforcement.¹⁰⁰

Perhaps the basic problem in enforcement turns on Service incentives in relation to expected revenue returns and the effectiveness of procedures for review. Mr. Sugarman recently estimated that the Internal Revenue Service was responsible for collecting "\$70 billion a year" an average of "a dollar every second for 2,250 years." This astronomical sum comes from 70 different types of taxes ranging from those on adulterated butter to those on giant corporations, and they are reported on 800 different forms.¹⁰¹ The consequence to an organization which has strayed from the exempt path is the loss of exemption for the year in which the offense occurred and the loss to contributors of similar tax favors. In view of the proportionate number of charitable organizations filing returns, there is question about the comparative value of pursuit of possible evaders. Mr. Sugarman reported to the Reece Committee that only 55 organizations had had their exemption revoked during the two year period ending June 1952.¹⁰²

Recent revisions in reporting methods are revealing.¹⁰³ Section 153 in the 1951 Act added considerable detail to the financial reports exacted from exempt organizations required to submit Form 990-A, provided for segregating the file, and made most of the data on the balance sheet available for public inspection. These changes were hailed as the beginnings of a national registry and certainly provided more information than the mere listing of the Treasury's *Cumulative List*. However, it was soon apparent that the revolution in reporting was far from complete. Investigators reported that getting the data from 64 scattered district offices was troublesome and unrewarding.¹⁰⁴ Many files were not segregated, and the reports themselves were sometimes incorrect or illegible. The American Foundation Service began collecting the information as it became available, but this attempt at a national registry was expensive and time consuming. The recently published *American Foundations and Their Fields* appears already outdated.¹⁰⁵

The reorganization recently carried on within the Service makes for certain streamlining in handling returns and most importantly the latest revision of the reporting forms 990-A include some material calculated to make a spot check much more revealing. Organizations are asked such relevant questions as: "If you acquired capital assets out of income, attach itemized list and amount thereof." "Have any changes

¹⁰⁰ Comment, 21 U. Chi. L. Rev., 127 (1953).

¹⁰¹ Sugarman, Proceedings National Tax Association, 384 (1954).

¹⁰² Reece Committee Hearings, 461 (1954).

¹⁰³ Bierman, "Relations with the Internal Revenue Service," *Proceedings New York University Second Biennial Conference*, 25 (1955).

¹⁰⁴ Andrews, *Philanthropic Foundations*, 306 (1956); Bornet, *California Social Welfare*, 138 (1956).

¹⁰⁵ Bornet, *op. cit. supra* at 134.

not previously reported to the Internal Revenue Service been made in your articles of incorporation or by-laws or other instruments of similar import?"

It would seem that if tax exempt organizations are to be subjected to more critical scrutiny, the treasury is relying more on its field officers than the general public.¹⁰⁶ Although the validity of public reporting is rather generally conceded the practical fact is that more direct means seem essential if adequate accounting is to be exacted.

STATE TRENDS

Although legislative trends are subject to sudden reversals, the direction in the past ten years has been increasingly towards implementing the attorney general in carrying out his duties with regard to trust enforcement. Some states have only made explicit the common law duties of the attorney general with regard to enforcement by specifying them in the statutes. South Dakota¹⁰⁷ has recently passed a law detailing some of his duties.

California and Massachusetts have most recently created a separate division for the administration of charities under the attorney general. The developments in Massachusetts are particularly interesting because Attorney General Dever began investigating the situation in 1936.¹⁰⁸ Reporting that in one county alone the unrestricted bequests for charity alone equaled more than \$26 million, and those restricted to charity totaled \$21 million during the period from 1915 to 1935, he asserted that the attorney general was in no way able to identify existing trusts nor was he equipped to carry out his presumed duties. His successor Attorney General Bushnell repeated Dever's urgings, but the Judicial Council not only refused to recommend the proposed Division of Charities but warned that the scheme opened the door to bureaucratic powers "with all the possible conceivable, and proverbial insolence of office which the imagination of some future officials in the department might suggest."¹⁰⁹

Possibly the documented experience in New Hampshire and Rhode Island and general agreements by enforcement officials of the need for such legislation had eased the fears in Massachusetts. In any event Chapter 529 of the Acts of 1954 established such a division. The provisions of this act are comparable to those in the New Hampshire statute, and Ernest D'Amours who pioneered in setting up the registry in his own state consulted with Massachusetts legislative groups in the preparation of the present law.

The Massachusetts statute empowers the attorney general to appoint an assistant as Director of the Division. Under Sec. 8E all foreign

¹⁰⁶ Balter, *Fraud Under Federal Tax Law*, 60 (1953).

¹⁰⁷ South Dakota Senate Bill No. 77, 34th Sess., Legislative Assembly, S. D. (1955).

¹⁰⁸ Details summarized in Mass. Public Doc. No. 12 reprinted 30 Mass. L. Q. Rev. 22 (1945).

¹⁰⁹ *Id.* at 42.

charitable corporations with the exception of certain veteran groups must file their charter with the attorney general and report to his office. Sec. 8F specifies that the trustees or governing board of "every public charity" including those excepted in the preceding section shall file an annual report. This report is to include:

the names and addresses of the trustees, or if the public charity is an organization, the name and address of the organization and the names and addresses of the members of its principal governing board and of its principal officers, and if the organization is a corporation, the statute under which it was incorporated; the aggregate value of endowment and other funds, the aggregate value of real estate, and the aggregate value of tangible personal property held and administered by the public charity for charitable, educational, benevolent, humane, or philanthropic purposes or for other purposes of public charity, all as shown by the books of the public charity at the end of said fiscal year, and the aggregate income and the aggregate expenditures of the public charity for such fiscal year; provided, however, that a public charity which annually furnishes to interested persons or publishes a financial report containing information as to endowment and other funds, real estate or tangible personal property, income and expenditures required by the preceding sentence, may file a copy of such financial report for any year with the division as its report for such year under this section as to the matters covered by said financial report, and provided, further, that a public charity which is required by law to file accounts in a probate court of the commonwealth may file a copy of such account for any year with the division as its report for such year under this section as to the matters covered by said account. This section shall not apply to any property held for any religious purpose by any public charity, incorporated or unincorporated. There shall be a filing fee of three dollars for each such report, to be paid to the division at the time of filing. In the event that any public charity shall fail for two successive years to file a report as required hereunder, the division may take such action as may be appropriate to compel compliance with the provisions of this section.

Important interrogatory powers include the right to examine books and records and call witnesses "who shall be summoned in the same manner and paid the same fees as witnesses in the superior court. Such witnesses shall be duly sworn and shall give testimony under the pains and penalties of perjury." (Sec. 8H) There is also the provision that the attorney general be made a party in any proceeding affecting his duties.

Assistant Attorney General Morton reports that it is too early as yet to draw any conclusions about the new division, pointing out that considerable time and labor has gone into the necessary transfer of

reports previously filed with the Department of Public Welfare and that the Division is in process of setting up procedures for handling reports. He adds, however:

It is already very clear that the combining of these reports, together with the appearance of the Attorney General in all probate proceedings affecting charities, has been a constructive step forward. As one would expect, it has taken some time to educate trustees and charities as to the new regulations, but the Division has had excellent cooperation from all concerned. In the long run it may well be that one of the chief values of the Division will be to provide a broad, practical and legal experience for lawyers and others who are handling the affairs of charities to draw on. In the end, of course, this will mean a better application of funds to public charities.¹¹⁰

The Attorney General of California thinks it too early to comment on the new legislation there. However, it is important to remember that the attorney general in California had urged legislation to enable him to carry out his enforcement duties.¹¹¹ At the time such recommendations were made, his office was specifically charged with inspection of charitable corporations. The adoption of the Uniform Supervision of Trustees for Charitable Purposes Act means a greater extension of duties. Some hints as to the administrative involvements in setting up such machinery have been made clear by reports from Mr. D'Amours of the two years necessary to set up the registry through assignment to a staff member of the task of examining county records.¹¹² Indirect comment on the California situation comes from Vaughan Borner's review of the state welfare system in which he reported that the attorney general was still trying to identify the organizations covered by the Uniform Trustee Act.¹¹³ Mr. Borner also reported his discovery that few organizations in the Bay area seemed to think of themselves as charitable trusts or had filled out appropriate forms.¹¹⁴

The Ohio legislation is discussed elsewhere in this symposium. In general, the Ohio Act has not been as far reaching as that adopted in New Hampshire and Rhode Island in the exemption of charitable, religious, and educational institutions holding funds for their own corporate purpose and state or local agencies. Attorney General O'Neill's account of the legislative process is illuminating—particularly the steps by which bankers and probate judges became supporters of the measure.¹¹⁵

¹¹⁰ Letter dated June 20, 1956.

¹¹¹ Taylor, *supra*, note 47 at 46.

¹¹² Reports of Attorney General of New Hampshire, 1944.

¹¹³ For extensive discussion of the implications of such an act, see Bogert, *supra*, 56 at 650.

¹¹⁴ Borner, *op. cit. supra*, note 105, at 133.

¹¹⁵ Bogert, *supra*, note 56, at 646.

The South Carolina legislation adopted in 1953¹¹⁶ is the least inclusive of the statutes directed at improving trust enforcement. Trustees are required to file a certified copy of the trust instrument within sixty days after the establishment of the trust. Annual reporting calls for the names and addresses of trustees, including corporate trustees, a complete financial statement beginning with an inventory in the first filing and successive annual balances. Trustees are also required to summarize their general activities during the year. The attorney general is empowered to make rules and regulations necessary for compliance. Exemptions are more extensive than in other comparable legislation because in addition to the exclusion of churches, church operated orphanages, hospitals, colleges or universities, and school districts, banking institutions under state or federal banking supervision are exempt from reporting.

The two older statutes, those in Rhode Island and New Hampshire, have been in effect long enough for some evaluation. The New Hampshire legislation has been commented on in numerous reports and official meetings.¹¹⁷ Under the act now in effect¹¹⁸ a director is appointed by the governor with the advice and consent of the council. The director has the common law duties and powers of the attorney general in connection with trust enforcement. He also is charged with preparation of a register, which is open to the public, collecting reports and given broad investigatory powers. These include examination of witnesses under oath and access to any necessary documents or papers. Recalcitrant witnesses are subject to a fine of \$100. Probate registrars are also required to furnish files and permit examination at the request of the attorney general. No charitable trust shall be terminated unless the attorney general has been given an opportunity to be heard.

Although the framers of the law wished to include charitable corporations holding property in trust, neither the original act nor its revisions has extended to this group of charities. Nor are inter vivos trusts subject to the act until actual vesting. Mr. D'Amours' reports on the first years of operation point up the fact that though relatively little outright abuses were discovered, there were many instances in which trustees needed help in carrying out their duties. In his 1952 report Mr. D'Amours calls attention to the wide range of services including discovery of the unnecessary paying of taxes, help in speeding up settlements, assistance in modifying restrictive trust terms, and in one instance work with the Greek Consul to effectuate a scholarship gift to the Greek community. In his most recent summary Mr. D'Amours observes:

. . . we are pleased to report that the machinery established for the supervision and enforcement of charitable trusts is

¹¹⁶ S. C. Laws, No. 274 (1953).

¹¹⁷ National Association Proceedings (1947-1953).

¹¹⁸ N. H. Rev. Stat. Ann. c. 7, §20-32 (1955).

yielding increasing benefits for the people of the State. The understanding and cooperation of trustees have been augmented with each passing year. This supervision is no longer looked upon as an unwelcome intrusion, but on the contrary as a useful device for the protection of all parties concerned—the donor, the trustee and the beneficiary.¹¹⁹

The Rhode Island statute¹²⁰ is similar to that adopted in New Hampshire. There are some of the same exclusions: those accorded charitable and religious institutions holding funds for their own charter or corporate purposes and charities not actually vested. The attorney general is given powers to set up a register but there is no compulsory reporting provision such as obtains in New Hampshire though failure to report for a two year period is classified as a breach of trust. Reports are to include identifying data and financial accounting. Probably because the statute was passed shortly after the investigations into the Textron Trusts, there is the specific provision that a trustee may not be excused from reasonable care, diligence, and prudence by the terms of the instrument. In 1955 Mr. Hoban, who now serves as Administrator of Charitable Trusts under the remedial legislation adopted in 1950, reported that four hundred and fifty three trusts having an appraised value of over \$60 million had been registered with the division. He was able to report also that assets over \$34 million were actually in the hands of beneficiaries and the registry of another \$28 million which will be vested at some future time.¹²¹

PROPOSALS

Bogert in discussing the terms of the Model Act emphasizes the variety of charitable organizations affected by such legislation and the need for adaptation to the special circumstances of a given jurisdiction.¹²² The new state statutes illustrate the varieties possible. However, they all try to solve the problem through supplying the attorney general with the powers and the means for effecting court supervision. The exemption of certain trusts from the provisions of these new acts seems to reflect the accidents of the legislative process and the rationale is that of covering the "danger areas."

Because the American foundations so often assume the corporate form, it would seem advisable to give the inclusive definition to "Trustee" suggested in the Uniform Act. The question of inter vivos trusts and the nuisance value of registry prior to vesting has to be weighed against the failure to identify such gifts. This is a policy question about which there is considerable disagreement, but in view of the public consequences of such a gift, it is arguable that there be some way of knowing when trustees assume duties for holding such a trust. The provision

¹¹⁹ N. H. Attorney General's Report for 1952-1954, 2.

¹²⁰ R. I. Laws 1950, c. 2617 as amended by Chapter 2852 of R. I. L. (1951).

¹²¹ Report of Administrator of Charitable Trusts, Jan. 1955.

¹²² Bogert, *supra*, note 56, at 650.

that the attorney general be an indispensable party to suits would, of course, increase the likelihood of identifying existing trusts. Bogert suggests the possibility of requiring that filing for tax exemption include registration of a charitable trust with the attorney general or the alternative of having the tax authorities supply the names and addresses of trustees claiming exemption.¹²³

The question of public policy and the role of various groups with a legitimate interest in charitable supervision raise a vexing problem of shared responsibility. Traditionally the responsibility for charitable supervision has been that of the courts and the reforms effected and urged have been in the implementing of this legal machinery. In this connection a proposed model draft drawn up by students in the Harvard Legislative Research Bureau takes a somewhat different approach.¹²⁴ Although the writers warn of the unofficial nature of their draft and its tentative character, some of their proposals are provocative enough to review. In explaining the purposes of the act the draftsmen state:

1. It applies only to charitable trusts, as opposed to gifts upon conditions to charitable corporations.
2. It requires registration of charitable trusts.
3. There is a Commission on Charitable Trusts whose primary duty it is, with the assistance of its general counsel and secretariat, to bring before the appropriate state court, when desirable, schemes for the new application of charitable trust funds.
4. When it appears that changing conditions require that a scheme be applied, the procedure can be set in motion either by the trustees or by the General Counsel of the Commission. Hearings will be held, and ultimately, if the Commission adopts a scheme, the General Counsel will go before the appropriate court in the name of the Commission to secure an order to put the scheme in effect.
5. Trustees who get no response or an unfavorable response when they believe a scheme is desirable can get before the courts directly. Trustees who believe there is a better scheme than the Commission's can submit their schemes in the alternative. And trustees who oppose any deviation from the terms of the trust can contest the schemes through the Commission's hearings and in the courts.
6. The ultimate determination of whether to order a scheme or not and, if so, which, is in the hands of the courts. It is presumed that great weight will be assigned to the Commission's determinations although, of course, no formal rules for judicial review are incorporated since the Com-

¹²³ *Id.* at 656.

¹²⁴ In giving permission to quote from this Model Act the writers emphasized that it was in no way an official statement from Harvard University but is the work of a student group.

mission's role is that of plaintiff before the court rather than that of an agency which has made a determination binding upon any party.¹²⁵

The suggestions of the Nathan Committee on the need to redefine charitable purposes are apparent in the first section which sets out a definition of charitable purposes as including "the relief of poverty, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community." Section 2 stipulating court powers provides for scheme-making with emphasis on liberalizing the *cy pres* doctrine. Schemes may be applied for when the trust instrument does not provide for possible surplus funds or accumulation or combination when they are insufficient. More importantly Sec. 2B provides:

When ordering a scheme, the court shall have regard for the public interest particularly of the locality in which the charitable trust was to have been applied originally, and special regard for the spirit of the charitable intention of the donor, whether the charitable intention was general or specific. Application of funds 'as near as' possible to the original purpose shall be desirable but shall not be the exclusive criterion.

The donor's wishes are to be regarded but not determinative and though a condition of reverter may prevent application of the scheme, it would be effective for only a 35-year period.

It is in the creation of a special commission that this proposed act differs most from existing regulatory measures. The Commission is to be group appointed by the governor with legislative consent (where this is usual). Terms are to be staggered, and the chairmanship rotating. Members are to be selected with due regard for "their standing and experience in public, academic or charitable affairs." The commission seems to be designed to act as a combination advisory and administrative group. The powers are granted to it for drafting and approving schemes and recommending them. Two staff members, a secretary, and a general counsel are assigned to the commission though they, too, are to be appointed by the governor. These two officials divide the duties usually assigned to the attorney general in the states having trust registries. The secretary has responsibility for setting up a registry, collecting reports, and making recommendations to the commission regarding them. The general counsel acts as an advisor to donors, trustees and named beneficiaries. It has the usual investigative powers found in the Uniform Act and similar measures, but his duties with regard to helping in the scheme-making process are more explicit. The drafters point out that their recommendations are based on the idea that review of schemes can best be accomplished by a group of citizens who are developing a growing body of experience. The commission is also intended to relieve the attorney general of re-

¹²⁵ Model Statute of Charitable Trusts, Draft #4, 14 and 15.

sponsibility for overseeing charitable trusts, which they appear to regard as having come about through historical accident rather than logic.¹²⁶

In carrying over the suggestion of the Nathan Report regarding the composition of the Commission, the proposed statute emphasizes the British view that charities are of wide social concern and require the collaboration of laymen as well as legal experts.¹²⁷ Although lay boards have wide acceptance in the United States both in the case of social agencies and the large operating foundations, the idea of a public Commission with designated supervisory responsibilities over charitable trusts would raise considerable debate.¹²⁸ In many quarters this might be regarded as usurping the administrative function of trustees.

The most discernable trend within the decade has been the growing acceptance of the idea of the need for charitable supervision. Governmental activity in this field has been stepped up markedly. Five states have adopted specific measures to assure supervision. Ten others have indicated that some measures like the Uniform Act have been under consideration. Officials in a majority of states have expressed their concern. Shifts in Federal reporting measures seem calculated to protect charitable exemption more stringently.

At the same time that public officials have been assuming more responsibility for duties with which they are charged, foundations themselves have urged consistent voluntary reporting and collaboration with governmental review. The Cox hearings brought out the general acceptance by the larger foundations of their identity as public trusts.¹²⁹ The phrase "glass-pockets" to describe the appropriate foundation garb has become a kind of by-word in discussion of the subject. The most important recent development has been the establishment of the Foundation Library Centre under the direction of F. Emerson Andrews. As the New York Times editorial¹³⁰ pointed out Mr. Andrews is recognized as perhaps the best informed person in the country on foundations and their operations. He has also been one of the most consistent advocates of public accountability, including the creation of a registry, compulsory annual reporting, and provision for regular review by a public authority with power to correct abuses.¹³¹

The Foundation Library Centre was set up under an initial grant from the Carnegie Corporation as an education institution under the Board of Regents of the University of the State of New York. Its charter statement sets out its purpose "to collect, organize, and make available to the public reports and information about foundations."¹³²

¹²⁶ *Id.*, §§3-5.

¹²⁷ Nathan Report, 95.

¹²⁸ See, *supra*, note 108. Also note the discussion of attitudes of foundations themselves regarding a central organization. Andrews, *supra*, note 29, at 340.

¹²⁹ Cox Select Comm., *supra*, note 99, at 13.

¹³⁰ N. Y. Times Editorial, Dec. 18, 1956.

¹³¹ Hearings Select Cox Comm., *supra*, note 37, at 48, 84.

¹³² Prospectus, 1.

Since the organization was officially opened during the week of December 18, 1956 its prospectus is the chief basis for anticipating its activities. The Centre received as a gift or depository loan, all the related material that the Russell Sage Foundation has been accumulating since 1915. "It has secured photographic transcripts of financial and other data on some seven thousand organizations of the foundation type. It is currently accumulating information from individual foundations . . . Future plans include assembling of recent financial data from the office of the Internal Revenue Service and preparation of a directory."¹³³ The important difference between this and any preceding venture is not only the sheer amount of information that is to be made publicly available but the stimulus to reporting and to research. The Centre is to provide an internship in philanthropy to a person nominated by a foundation. There is potential here not only for staff training but for basic research in the whole field of philanthropy.

The recent developments go far towards solving some of the problems that have been pointed up in the field. Yet many of these are the complex ones for which there is no Univac answer. One of the problems in philanthropy, like that in other areas is for adequate channels of communication between interested persons in the field. What may become a new issue is how to determine the role of various citizen and professional groups. This problem will inevitably face lawyers, legislators, donors, trustees, and beneficiaries who share alike responsibility for stewardship.

¹³³ *Id.*, 2.